



Notre Dame Law Review

Volume 33 | Issue 1

Article 2

12-1-1957

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Recommended Citation

Robert E. Rodes, *Due Process and Social Legislation in the Supreme Court--A Post Mortem*, 33 Notre Dame L. Rev. 5 (1957).

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NOTRE DAME LAWYER

A Quarterly Law Review

VOL. XXXIII

DECEMBER, 1957

No. 1

DUE PROCESS AND SOCIAL LEGISLATION IN THE SUPREME COURT — A POST MORTEM

Nowadays, there is no more discredited era in our judicial history than that represented by such cases as *Lochner v. New York*.¹ During this era, we are told, our ancestors were so benighted economically as to embrace economic principles incapable of producing the good life, and so benighted judicially as to read their economics into the Constitution. We have barely left behind us the bulk of the advocates and judges whose role in history it was to slay the giant *laissez-faire*, so it is not surprising that we should have no picture of their adversary but the one that was drawn in the heat of battle. It is perhaps time, however, to consider what it is that has fallen in the fight, what weapons brought it down, and indeed, why it was worthy of the fate it suffered. This article will attempt to explore the nature and significance of the conceptual structure in which the validity of the growing body of social legislation was put to the test under the fourteenth amendment, from the first cases at the end of the nineteenth century to the eve of the final triumph in 1937.

I

The first premise of the structure is the freedom of the individual. The powers of government are limited; residual power is in the individual and government must point to a justification

¹ 198 U.S. 45 (1905).

for what it does. Until the dissenting opinion of Mr. Justice Holmes in *Lochner v. New York*, this premise is never questioned. This freedom is derived not from tradition but from philosophy. Field, in the major dissenting opinion in the *Slaughter-House Cases*,² relies on the Declaration of Independence, Adam Smith, Blackstone, the struggle against monopolies in England in the reign of James I, and a decree of Louis XVI of France in 1776, abolishing the monopolies of guilds and trading companies as violative of natural rights. Forty years later, Lamar, dissenting in *German Alliance Ins. Co. v. Lewis*,³ points to the mounting sense of injustice that led the Parliament of the mother country to abandon the odious restraints so happily abrogated by our own fundamental law. Freedom of the individual, then, is still revolutionary in the nineteenth century and emerges as an emotional as well as a philosophical commitment. It is something recently won and for which we have paid a high price. So Brewer, dissenting in *Budd v. New York*:⁴ "The paternal theory of government is to me odious." Witness also the bitterness of Peckham in *Lochner* itself.⁵

Thus it is not from tradition alone that the constitutional protection accorded liberty and property derives its meaning. Meaning is given it from the battlefield, where the mercantilism of the eighteenth century, and the whole structure of the medieval and post-medieval state are overthrown. Liberty and property are the great contribution of the nineteenth century to western civilization. Whether they are privileges and immunities of citizens, as the dissenters in the *Slaughter-House Cases* insisted,⁶ or are that of which no man can be deprived without due process of law, as all the judges admitted in *Munn v. Illinois*,⁷ what they are is well understood, together with the kind of state they presuppose. A man's freedom of action is circumscribed by only two things — the confines of his property, and the necessity of his neighbor for a like freedom.⁸

² 83 U.S. (16 Wall.) 36, 83 (1873).

³ 233 U.S. 389, 418 (1914). See also Bradley's dissent in the *Slaughter-House Cases*, 83 U.S. at 111.

⁴ 143 U.S. 517, 551 (1892).

⁵ "Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living are mere meddlesome interferences with the rights of the individual." 198 U.S. at 61.

⁶ 83 U.S. (16 Wall.) at 83; *id.* at 111; *id.* at 124.

⁷ 94 U.S. 113 (1877); *id.* at 136 (Field, dissenting).

⁸ *Id.* at 124; *id.* at 145.

Corresponding roughly to these two circumscriptions are the two powers of government that figure chiefly in this structure—the “public interest” power, quasi-proprietary in nature, which the sovereign can exert over certain things,⁹ and the “police power” whereby the sovereign can provide for the vindication of one man’s liberty and property against those of his neighbor.¹⁰ Governmental action that can be referred to either of these two powers constitutes “due process of law.”

The public interest power is established in *Munn v. Illinois*,¹¹ where the court discerns such an interest in the grain elevators in Chicago, which “stand in the very gateway of commerce, and take toll from all who pass.”¹² Field, dissenting,¹³ insists that there is no public interest except in property acquired or used under some special privilege accorded by the sovereign, but the majority finds it where the situation smacks of monopoly; in *Brass v. North Dakota*,¹⁴ even this requirement will be abandoned. The growth of the public interest power will be resisted strenuously but in the end no line can be drawn to check it.¹⁵

In the field of social legislation, however, the public interest power will play only a peripheral part. The dominant concept will be that of the police power, a core function of government, to which Field—in economic and social matters the leader of the *laissez-faire* wing—gives vigorous recognition elsewhere. Under this power, government can forbid laundries to operate at night when they might set a sleeping city afire,¹⁶ require railroads to fence their tracks lest livestock be struck by a train,¹⁷ regulate the educational level required of those who practice medicine,¹⁸ protect the citizen from the deceitful potentialities of oleomar-

9 *Munn v. Illinois*, 94 U.S. 113 (1877).

10 See, e.g., *Mugler v. Kansas*, 123 U.S. 623 (1887) (prohibition). Hereafter, the power of government to vindicate an interest of this sort will be referred to as the “police power” whether or not the term is used in the material under discussion.

11 94 U.S. 113 (1877).

12 *Id.* at 132.

13 *Id.* at 136.

14 153 U.S. 391 (1894).

15 See pp. 22-23 *infra*.

16 *Barbier v. Connolly*, 113 U.S. 27 (1885); *Soon Hing v. Crowley*, 113 U.S. 703 (1885).

17 *Missouri Pac. Ry. v. Humes*, 115 U.S. 512 (1885); *Minneapolis & St. L. Ry. v. Beckwith*, 129 U.S. 26 (1889).

18 *Dent v. West Virginia*, 129 U.S. 114 (1889).

garine¹⁹ and his family from the demoralizing potentialities of drink.²⁰ Further, it can advance the general prosperity by providing for the draining of a swamp,²¹ and even, on the payment of suitable compensation, for the flooding of one man's land by another man's dam.²² The history of the expansion of the constitutional scope for social legislation is the history of the expansion of the police power.

II

Up to the time of *Lochner*, all the social legislation brought before the court was sustained, on a miscellany of grounds. The abolition of the fellow servant rule for liability of railroads to their employees was upheld partly as a reasonable application of common law analogies, partly as a reasonable regulation by the state of its corporate creature.²³ Of three cases upholding legislation as to manner of payment of wages, one, involving a statute forbidding railroads to discount for early payment to discharged employees,²⁴ went off on the power of a state to regulate its own corporate creature, while another, involving a statute forbidding advance payment of seamen's wages,²⁵ went off partly on the traditional condition of tutelage under which the employment relations of seamen stood, partly on the helplessness that made that condition reasonable.

Knoxville Iron Co. v. Harbison,²⁶ the third wage case, upheld the right of a state to require a company paying wages in scrip to redeem the scrip in cash even though it purported to be re-

¹⁹ *Powell v. Pennsylvania*, 127 U.S. 678 (1888).

²⁰ *Mugler v. Kansas*, 123 U.S. 623 (1887) (prohibition); *Crowley v. Christensen*, 137 U.S. 86 (1890) (regulation). In both these cases, the court found it necessary to address the point that drinking, being injurious to no one but the drinker himself, could not be regulated by society. Each time the point was finessed by an allusion to those other than the drinker who are hurt.

²¹ *Chicago, B. & Q. R.R. v. Illinois ex rel. Drainage Com'rs*, 200 U.S. 561 (1906).

²² *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885).

²³ *Missouri Pac. Ry. v. Mackey*, 127 U.S. 205 (1888). It should be noted that the power of the state to regulate the corporation is a function of the public interest power, the corporate franchise being a privilege bestowed by the state justifying the exertion of this power. Still, the reasonableness of the exercise of the power is determined by the court.

The common-law analogies drawn are to cases imposing absolute liability for loss of freight. *Cf. Chicago, R.I. & P. Ry. v. Zernecke*, 183 U.S. 582 (1902) (upholding statute imposing absolute liability for injury to passengers); *St. Louis & S.F. Ry. v. Mathews*, 165 U.S. 1 (1897) (upholding statute imposing absolute liability to adjoining landowners for fire).

²⁴ *St. Louis, I.M. & S. Ry. v. Paul*, 173 U.S. 404 (1899).

²⁵ *Patterson v. Bark Eudora*, 190 U.S. 169 (1903).

²⁶ 183 U.S. 13 (1901).

deemable only in kind. This holding was rested squarely on the police power—to prevent the employee being overreached, and to foster good relations between employer and employee. Somewhat similar considerations were spelled out at greater length in support of the decision in *Holden v. Hardy*²⁷ permitting the state to limit to eight the number of hours a miner works underground in a day.

In these last two cases, it will be observed, the police power has already made a bid to impose new limits on the philosophical libertarianism described above. The *Knoxville Iron* case and *Holden v. Hardy*, particularly the latter, can stand only if one admits one or the other of the following two propositions:

1. Necessitous circumstances can vitiate the freedom properly present in the making of a contract.
2. The public has an interest in the welfare of a citizen that can be protected even against that citizen himself.

As a matter of fact, the Court seems to have embraced both. *Peckham* and *Brewer*, perhaps more farsighted than the others, dissented in both cases, albeit without opinion.

Neither of these two propositions is compatible with the strict view of liberty and property as absolutes, limited only by similar rights of liberty and property in another person. The first one is inconsistent with regarding property as such an absolute: as *Pitney* later pointed out, speaking for the majority in *Coppage v. Kansas*,²⁸ inequality of bargaining position inheres in inequality of resources; thus, to deprive a man of the advantage of a superior bargaining position as such is to deprive him of property as such. The second of the above propositions is inconsistent with regarding liberty as an absolute, since a man who quietly destroys himself is in no way interfering with the liberty of another.

The first proposition, expressed in terms of inequality of bargaining position, as an independent argument for state power, never succeeded in surmounting the logic of *Pitney's* objection. Its further use is always ancillary to some other principle.²⁹ Thus, it is through the adoption of the second proposition

²⁷ 169 U.S. 366 (1898).

²⁸ 236 U.S. 1 (1915).

²⁹ See *Chicago B. & Q. Ry. v. McGuire*, 219 U.S. 549 (1911). This may well have been its use in *Holden v. Hardy* itself — as ancillary to the right of the state to protect the health of the worker. Its appearance in the *Knoxville Iron* case may, although not without some difficulty, be characterized as ancillary to the vindication of the original wage contract expressed in dollars and cents. This strikes one as some-

that *Holden v. Hardy* makes a permanent contribution toward restoring us to membership in one another: the state may now under appropriate circumstances protect the worker against himself.³⁰

The scope of the protection thus made possible is qualified severely by *Lochner*. The statute involved in that case, it may be recalled, forbade the employment of bakers for more than a ten hour day or a sixty hour week. Peckham, speaking for a majority, denied that the act was a legitimate exercise of the police power. Bakers, he found, are under no greater disability to fend for themselves than anyone else. Nor is their work especially unhealthy, except to the extent that a life of labor is necessarily less healthy than a life of ease. Thus, the statute seemed calculated not to vindicate a legitimate police interest of the state, but to meddle in the forbidden area of private contracts as such. The impressive data brought forth in Harlan's dissent as to the woes peculiar to bakers as a class was evidently not regarded by the majority as sufficient to bring the case within the scope of *Holden v. Hardy*.³¹ Indeed, the argument of the majority is lent some force by a shrewd observation that behavior with equal danger to health outside the employment context would not be regarded as subject to the police power of the state.

There were two dissenting opinions. Harlan's, joined in by two others,³² did not question the traditional freedom-police-power analysis, but found persuasive facts to indicate that

thing of a bootstrap argument. The practice involved in *Knoxville Iron* is not open to the objection that it paves the way for fraudulent practices in the computation of the wage in fact due. Cf. *McLean v. Arkansas*, 211 U.S. 539 (1909).

³⁰ Such a holding is perhaps foreshadowed by a dictum in *Soon Hing v. Crowley*, 113 U.S. 703 (1885), in which the "physical and moral debasement which comes from uninterrupted labor" is pointed to as justifying the Sunday laws.

³¹ *Lochner* is often regarded as a landmark example of judicial insistence on the use of "common sense" in opposition to the data submitted by the experts. See Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909). For reasons that will be gone into at greater length below, see pp. 27-28 *infra*, this analysis seems unsatisfactory. The use of sociological data in *Muller v. Oregon*, 208 U.S. 412 (1908) seems better explained by saying that the data there submitted corresponded favorably with the ideological presuppositions of the judges than by saying that the majority underwent a change of conviction as to the validity of such data. Thus, the issue between the majority and Harlan in *Lochner* would seem to be not whether the lot of the baker was as wretched as it was made out to be, but whether it was wretched enough to justify the intervention of the state—not a sociological question, but an ideological one. As will be seen from the discussion below, the extent to which interference with interests adhered to ideologically can be justified on sociological grounds becomes a serious question.

³² 198 U.S. at 65.

baking should be regarded as a special situation, as mining was in *Holden v. Hardy*. It at least hinted that the same considerations might justify regulation of all hours of work, there being considerable debate as to how many hours of work were consistent with the health of the worker. Holmes, in a short dissent,³³ set forth an entirely different view. The Constitution, he insisted, leaves the legislature free to adopt any economic views that may commend themselves; indeed, the Constitution cannot serve to check any sufficiently strong and sustained current of public opinion that does not run afoul of some "traditional" liberty—which it does not here.

The Holmes dissent appears to be more a declaration of faith than an answer to the arguments used by the other justices. These arguments are based on the individualistic and revolutionary ideological structure set forth above. Since this structure is individualistic, its adherents cannot accept the determinative force Holmes accords public opinion. Since it is revolutionary, its adherents cannot content themselves, as Holmes does, with "traditional" liberties. Holmes, therefore, gives no more than an a priori denial of an a priori position, and his views have no support beyond such intrinsic appeal as they may have for a likeminded reader. It is Harlan's dissent, which does not challenge the basic ideological position of the majority, that will shape the future arguments in social legislation cases.

For a dozen years after *Lochner*, the scope of permissible social legislation is expanded, but the cases involve little in the way of new principle. Further regulation of the manner of payment of wages and the like is sustained.³⁴ The Federal Employers' Liability Act is upheld as productive of a better and safer commerce.³⁵ A meticulous compilation of sociological data, together with an innate sense of chivalry, leads the court to permit for women the regulation of hours *Lochner* forbade for men.³⁶ But

³³ *Id.* at 74.

³⁴ *McLean v. Arkansas*, 211 U.S. 539 (1909) (miners to be paid before coal is screened); *Mutual Loan Co. v. Martell*, 222 U.S. 225 (1911) (regulating assignments of wages); *Erie R.R. v. Williams*, 233 U.S. 685 (1914) wages to be paid in cash twice monthly).

³⁵ *Second Employers' Liability Cases*, 223 U.S. 1 (1912).

³⁶ *Muller v. Oregon*, 208 U.S. 412 (1908). This theme was elaborated upon in *Bosley v. McLaughlin*, 236 U.S. 385 (1915). Further restrictions in the interest of efficient administration were upheld in *Riley v. Massachusetts*, 232 U.S. 671 (1914). Other more or less significant cases during the period under discussion are *Sturges & Burn Mfg. Co. v. Beauchamp*, 231 U.S. 320 (1913), allowing a state to forbid the

state and federal laws prohibiting employer discrimination against union members are invalidated.³⁷ *Coppage v. Kansas*, dealing with state law, is the high water mark of the *laissez-faire* doctrines, coming just before what turns out to be a new departure in the direction of making the employer his brother's keeper.

In holding that the state cannot forbid the yellow-dog contract, Pitney, speaking for the majority in *Coppage*, restates the whole individualistic philosophy, and the interests it does and does not recognize. It will not be held, he says, that the state has an interest in fostering labor unions, since there is no reasonable relationship between unions and the health, safety, morals, or welfare that have been traditional police concerns of the state. On the other hand, it cannot be said that no legitimate interest of the employer is served by the yellow-dog contract, since the contracting party is presumed to be the best judge of his own interest. This leaves only the argument that the contract is signed by the employee through "coercion." But coercion is an unlawful influence and this influence is lawful. To be sure, the worker may need the job more than the employer needs to hire him, but this situation inheres in the difference between their respective estates, which in turn inheres in our constitutionally protected economic system. If we are to protect a person against the weakness of his bargaining position as such, our object is to level the differences of estate that the Constitution protects when it protects property.

There are two dissenting opinions. Day's³⁸ is on fairly narrow grounds, and generally unsatisfactory. Holmes'³⁹ is, like his others, short, clear and forceful, but again does not seem to address itself to the prevailing opinion. Holmes refers to the

employment of minors under sixteen in hazardous occupations, and to make good its prohibition by making the employer strictly liable for injuries even though the minor misrepresented his age; *Chicago, B. & Q. Ry v. McGuire*, 219 U.S. 549 (1911), to the effect that a state can forbid a contract disruptive of the policy of its employers' liability laws; and *Barrett v. Indiana*, 229 U.S. 26 (1913), upholding a safety regulation for coal mines because the Court is unable to say that it will not promote safety. Compare *Smith v. Texas*, 233 U.S. 630 (1914) (statute requiring man to be brakeman for two years before becoming conductor has no reasonable relation to fitness, and is therefore arbitrary). The difference in proof requirements in these two cases is probably responsive to the existence in *Smith* of the possibility of a legislative purpose antithetical to a judicially protected interest. See p. 28 *infra*.

³⁷ *Adair v. United States*, 208 U.S. 161 (1908); *Coppage v. Kansas*, 236 U.S. 1 (1915).

³⁸ 236 U.S. at 27.

³⁹ *Id.* at 26.

"equality of bargaining position at which freedom of contract begins," but the majority opinion has demolished his argument on premises that he does not trouble himself to deny. The real weak point in Pitney's argument—his assertion that there is no legitimate interest of the state in fostering labor unions—goes all but unchallenged except insofar as it is subsumed by both dissenting opinions under the question of equality of bargaining position or that of coercion.

Coppage presented the last statement of the unadulterated individualist position. Less than two years later in the October, 1916, term sweeping changes were produced in doctrine, which furnished new ammunition to the supporters of social legislation, and set a new tone to the arguments against it. Paradoxically, the author of the most important opinions in this new turn of affairs was Pitney himself. The occasion was the sustaining of the three varieties of workmen's compensation legislation.⁴⁰ In two of the cases, the decision was unanimous; in the other, the requirement of insurance in a state fund provoked four dissents without opinion.

The objection to workmen's compensation legislation has probably been best stated by the New York Court of Appeals in the *Ives*⁴¹ case. That case has sometimes been reduced to an a priori statement that there can be no liability without fault, but actually it goes much deeper. Such a statement is itself a short-hand reference to principles more fundamental. To the *Ives* court, workmen's compensation is Robin Hood legislation—it takes from the rich to give to the poor with no justification except the discrepancy in financial standing itself. Fault is a relationship; it casts the one at fault into a nexus with his victim, to which nexus the law can attach consequences. But the Constitution will not admit of making a man responsible for a stranger as long as it undertakes to protect property. The unspoken assumption behind this argument, of course, is that employer and employee are strangers. Presumably, this rests on the further assumption that there is nothing between them but a contract, and that a contract will create no relation between them that is not contracted for.

⁴⁰ *New York Central R.R. v. White*, 243 U.S. 188 (1917) (compulsory, privately insured); *Hawkins v. Bleakly*, 243 U.S. 210 (1917) (elective); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917) (compulsory, monopolistic state fund insurance).

⁴¹ *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 94 N.E. 431 (1911).

The Supreme Court's opinion sustaining the law⁴² goes straight to the root of the view taken in *Ives*. Worker and employer, says Pitney, are engaged in a common enterprise to which the worker contributes his bodily integrity as the employer contributes his capital. The nature of industrial life is such that it can be predicted that a certain percentage of those at work will be killed or injured each year. This is a risk of the business, and should be borne by the business—that is, by the person whose role in the business is to make the profits and bear the risks: the employer.

This holding would seem to represent a considerable departure from what has gone before, although at the time it cannot have been so regarded. Today, there would seem to be no way to read it except as recognizing a status relationship between employer and employee, out of which all manner of social responsibilities can arise independently of the employment contract. It is scarcely conceivable, though, that McReynolds would have let it by on so broad a basis. At any rate, the basis was spelled out in three cases expanding the constitutional permission for such legislation. McReynolds dissented in all.⁴³

The opinions of the various justices in these three cases shed some light on the reasons which impelled them in the original case. Holmes, for instance, sets forth his views in the *Arizona Employers' Liability Cases*,⁴⁴ where state legislation is sustained providing for liability without fault to the full extent of damages fixed by a jury. Pitney leads off by stating that the same reasons that led to the upholding of workmen's compensation in the usual form are applicable here. Holmes⁴⁵ disagrees; he does not feel that the joint enterprise found by Pitney matters. What persuades Holmes is that liability without fault is an old story in our legal system, and has been created sometimes in the interests of making people extra careful, sometimes for other purposes.

⁴² *New York Central R.R. v. White*, 243 U.S. 188 (1917).

⁴³ *Arizona Employers' Liability Cases*, 250 U.S. 400 (1919); *New York Central R.R. v. Blanc*, 250 U.S. 596 (1919); *Ward & Gow v. Krinsky*, 259 U.S. 503 (1922). Another case, in which no one dissented, rejected the theory that the purpose of workmen's compensation was to prevent the injured worker or his dependents from becoming public charges. On the contrary, said the court, the purpose is to protect safety and give security. *Madera Sugar Pine Co. v. Industrial Acc. Comm'n.*, 262 U.S. 499 (1923) (compensation can be awarded to alien dependents living abroad even though they would not become public charges if uncompensated).

⁴⁴ 250 U.S. 400 (1919)

⁴⁵ *Id.* at 431 (concurring opinion).

There are two dissenting opinions,⁴⁶ addressed generally to the idea that such liability departs too far from the contractual view of the employment relation, because it deprives the employer of his *quid pro quo* for giving up his common law defenses, or because it is too one-sided. It is also suggested that common-law damages are punitively conceived, and cannot be justified where no wrong has been done.

In the *Bianc*⁴⁷ case, the Court allowed compensation for disfigurement, against the contention that the original rationale applied only to wage losses. McReynolds dissented, alone and without opinion.

The final case in the series, *Ward & Gow v. Krinsky*,⁴⁸ upholds the compensation law when applied to a business where there was no foreseeable hazard, thus evoking a concurrence by McKenna in McReynolds' dissenting opinion. The dissenters quite correctly point out that the foreseeability of injury as a risk inherent in the business was relied on by the Court in the original case upholding the compensation principle. But Pitney, for the majority, counters by showing that the premium paid by the nonhazardous business for its insurance will be low, reflecting the lack of hazard.

What may be said of these three cases in sum would seem to be that they continue to reflect a certain amount of police power thinking—a worker who takes an inherent risk for a social purpose should be compensated if the harm eventuates—but are premised further on a value judgment quite inconsistent with the earlier view that one man's liberty and property can be circumscribed only by another's. Imposition on the employer of liability for a compensation admittedly due an employee from someone can only be justified on the basis of a status relationship between the two. Absent that, in this context, the police power has nothing on which to operate.

*Wilson v. New*⁴⁹ evoked more disagreement in the same term (October, 1916). This case affirmed Congressional power to make a temporary adjustment of railroad wages pending wage negotiations, and pending a consideration of the controversy by a commission set up for the purpose. The federal commerce

⁴⁶ *Id.* at 434, 440.

⁴⁷ *New York Central R.R. v. Bianc*, 250 U.S. 596 (1919).

⁴⁸ 259 U.S. 503 (1922).

⁴⁹ 243 U.S. 332 (1917).

power, involved here, seems to have evoked about the same complex of ideas as the state public interest power would have, although in Pitney's opinion the terminology is quite different. The issues as the various justices saw them were whether the public interest, with which the railroading business was admittedly affected, authorized a regulation of wages; and whether this temporary expedient was any better or any worse than a more permanent regulation of wages. A majority were of the opinion that this stood in better stead than a permanent regulation. Led by White, they held that this was a provision reasonably calculated to keep the railroads in business while a new wage contract was negotiated, and thus interfered in no way with freedom of contract. Two justices, Day and McKenna, expressed themselves as believing that the public interest power justified wage regulation. McKenna concurred in the result,⁵⁰ while Day dissented on the ground that Congress must inform itself before acting, and had acted here pending the assembling of information.⁵¹

Pitney, in the most significant dissenting opinion,⁵² used a terminology of commerce power, instead of one of public interest, and held that such power does not justify regulation of wages since the interest in such regulation is not commercial but humanitarian. The public interest goes no further than the maintenance of the services involved; and the fact that the workers will disrupt those services if not placated with higher wages does not make the interest other than the forbidden humanitarian one. Higher wages will not of themselves produce better work, any more than a legislated increase in the price of locomotives will of itself produce better equipment. Meanwhile, the regulation here involved fares no better than wage regulation generally, for the reasons given by Day, and because freedom of contract postulates freedom not to enter into relations until an agreement has been reached. Pitney's view of the commerce power, this time expressed only by a minority, will later, in *Railroad Retirement Bd. v. Alton R.R.*,⁵³ be adopted by a majority. The answer, formulated in Hughes' dissent in that case, that the power to regulate

⁵⁰ *Id.* at 360.

⁵¹ *Id.* at 364.

⁵² *Id.* at 373.

⁵³ 295 U.S. 330 (1935). The same considerations seem to be present in *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

commerce includes the power to see that those engaged in it act with due regard for their social responsibilities, will pose the chief issue in the New Deal cases, and will, of course, eventually prevail.

This same term also saw what appeared to be the demise of *Lochner*. In *Bunting v. Oregon*,⁵⁴ a divided Court sustained a state law limiting the working day for men in the major industries of the state to ten hours. The significant issue in the case seems to have been whether the provision for overtime pay turned the law from an hours regulation, calculated to insure the health of the worker, into a forbidden wage regulation. Having decided that it did not,⁵⁵ the Court used only a paragraph in deciding that hours regulation was not invalid as such. It first pointed out that the appellant had introduced no facts to prove his assertion that the statute had no reasonable relation to health. Then it referred to a general statement by the state court that the ten hour day was customary in Oregon and quoted other statistics as to the customary work day from the opinion of the state court (which had taken them from Harlan's dissent in *Lochner*).⁵⁶ Nowhere in the whole opinion is *Lochner* mentioned. Three dissenters did not hand down an opinion, and Brandeis, who might have given a more enlightening opinion on the majority side, did not sit. In this way, the general power of the state to regulate hours of labor was upheld.⁵⁷

This case must remain as something of a question mark, first, because it ignored *Lochner*, and second, because it placed the burden of producing data as to the social effect of the legislation under attack on the attacker, instead of the proponent of the legislation, who had always had it before. That some change in the sociological thinking of the court had taken place seems a necessary conclusion. That the justices were unwilling expressly to overrule *Lochner* would seem to indicate that the ideological presuppositions of that case still commanded some support

⁵⁴ 243 U.S. 426 (1917).

⁵⁵ See note 90 *infra*.

⁵⁶ *State v. Bunting*, 71 Ore. 259, 139 Pac. 731, at 735-36 (1914). Quoted in 243 U.S. at 438-39.

⁵⁷ Hours regulation in specific occupations where some public interest in the alertness of the employee supported the exercise of the police power had already been upheld. See, e.g., *Baltimore & O. R.R. v. ICC*, 221 U.S. 612 (1911) (railroads), as had general hours regulation for women. *Muller v. Oregon*, 208 U.S. 412 (1908) (need for healthy mothers justified use of police power).

among those who constituted the majority. A possible explanation of *Bunting* would be that it was responsive to a general conviction that the worker who worked more than ten hours a day in 1917 was in a social context that left him below the standard of bodily and mental health to which our civilization had attained. Since this would be a "common-sense" conviction, the judges would presumably rely on it unless sociological data were advanced to persuade them otherwise. At the same time, they would not have to say that the situation was similar with respect to bakers in 1905—thus *Lochner* would retain a certain validity.

At any rate, by the time of *Bunting v. Oregon* it must have been fairly clear that utilitarian considerations were generally running counter to the traditional constitutionally protected liberties in the economic sphere. The extent to which this was true was perhaps not as apparent to those ideologically committed to the maintenance of such liberties as it was to others,⁵⁸ but it was a factor to be reckoned with for everyone. What in *Lochner* was debatable even in the presence of sociological data was evidently undeniable in *Bunting*, on the basis of common knowledge alone. The time had come, then, for the advocates of economic liberty to reconsider to what extent the principles they espoused were to be maintained on ideological grounds, regardless of social effect. *Adams v. Tanner*,⁵⁹ also in the October, 1916 term, establishes the form this reconsideration will take.

The legislation involved in *Adams v. Tanner*, abolishing the private employment agency financed by fees collected from the worker, is supported by what is perhaps the prototypical Brandeis opinion.⁶⁰ Brandeis introduces masses of citations from investigative commissions and other groups to show the evils of the abolished agencies, as experienced both nationally and locally. From other such data, he shows that these evils cannot practically be eliminated without eliminating the agencies that produce them. He shows further that unemployment is an economic problem of general concern requiring a coordinated

⁵⁸ Sutherland, for instance, some years after the cases under discussion, introduces some egregious social and economic assumptions in support of his conclusions in, e.g., *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), without, however, affecting the fundamentally ideological grounding of his holdings.

⁵⁹ 244 U.S. 590 (1917).

⁶⁰ *Id.* at 597.

response. However, for a majority of the court, speaking through McReynolds, none of these considerations can avail to sustain the act. The business of finding jobs for those who need them is obviously not a noxious trade, but a useful one. The abuses that have been pointed out justify any regulation calculated to eliminate them,⁶¹ but not the entire abolition of a useful trade. Indeed, McReynolds continues, the real motive for the abolition is probably not the abuses, but the philosophical consideration that the worker has a right to a job, and that it is therefore wrong to maintain a system whereby it costs him money to find one. This consideration was advanced in support of the act, but of course is unavailing.

This is as far as McReynolds goes in spelling out his views. He makes no real attempt to distinguish the various cases that have regarded the potentiality of abuse as sufficient reason for abolishing such businesses as pool halls,⁶² margarine manufacture,⁶³ and trade in grain futures.⁶⁴ Two possible interpretations suggest themselves. One is that the philosophical consideration advanced by the state showed that the legislature was motivated not by the abuses referred to, but by the forbidden purpose of imposing on contractual relations an objectionable system of values.⁶⁵ The other possibility is that some distinction on the basis of the nature of the businesses abolished or other circumstances has been seized upon to weaken the authority of the old cases, so that, as a general rule, it will no longer be open to legislatures

⁶¹ There seems to be no doubt that McReynolds would have sustained substantial regulation seriously interfering with the conduct of the business. In general, regulation of employment agencies, including the requirement of a license, had already been upheld. *Brazee v. Michigan*, 241 U.S. 340 (1916).

⁶² *Murphy v. California*, 225 U.S. 623 (1912) (conducive to idleness and immorality).

⁶³ *Powell v. Pennsylvania*, 127 U.S. 678 (1888) (can be mistaken for butter).

⁶⁴ *Booth v. Illinois*, 184 U.S. 425 (1902) (possibility of gambling use).

⁶⁵ It should be noted that the philosophical consideration here referred to does not purport to be a principle of commutative justice ("it is unjust that a given worker should have to pay for the services rendered him by a given employment agency"), but a principle of social justice ("it is unjust that the institutions of our society should be such that a worker cannot find a job without paying for the services of an employment agency"). The distinction may be useful in interpreting some later cases, particularly *Home Bldg. & Loan Ass'n. v. Blaisdell*, 290 U.S. 398 (1934), and *Nebbia v. New York*, 291 U.S. 502 (1934), in both of which the requirements of the economy at large, rather than those of any individual, were relied on to sustain the legislation under attack. It would seem, however, that even in these cases, no distinction of this sort was germane to the cleavages in the court. Accordingly, in the discussion of the principles involved in the cases under consideration, no attempt to classify according to such a distinction will be made.

to protect the public health, safety, morals or welfare by abolishing a trade.

The first viewpoint is probably implicit in *Lochner*; the second would be new. They are perhaps interdependent in that whether the abuses to which a business is open would lead the legislature to abolish it must necessarily depend both on the abuses and on the social utility of the business minus the abuses. McReynolds can hardly mean that a state is no longer free to abolish pool halls or saloons. At any rate, it would seem that with *Adams v. Tanner*, the Court has gone beyond the old rule that circumstances justifying the exercise of the police power create a general exception to the general rule of freedom, and has begun to embroider upon it another rule that certain types of interference with freedom, of which prohibition of some businesses is an example, are exceptions to the exception, and cannot be justified even where circumstances call for an exercise of police power.

This October, 1916 term, then, sets up divergent principles that will appear in various juxtapositions in the thinking of the justices from here until the final green light for most social legislation is given two decades later. It might be well to recapitulate these principles and see where they are to lead.

1. There exists a social responsibility arising out of the employment relation, which the state may vindicate. This is the teaching of the workmen's compensation cases, and their sequels already discussed. On several occasions, however, it will still be stoutly denied.

2. Temporary legislation addressed to an emergency that can be shown to exist may stand in better stead than permanent legislation. This seems to be an important basis for *Wilson v. New*. It will be articulated as the justification for the mortgage moratorium in the *Blaisdell* case.⁶⁶ In the rent control cases,⁶⁷ it seems to appear as a special case of the public interest power.

3. Some individual rights are protected against governmental curtailment even if there exist circumstances requiring the government to act. This principle seems basic to judicial review of legislation. It has always been involved in the cases applying

⁶⁶ *Supra* note 65.

⁶⁷ *Block v. Hirsh*, 256 U.S. 135 (1921); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); compare *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924).

the distinction between the police power and the eminent domain power—the latter going more to the essence of the property right than the former.⁶⁸ In *Adams v. Tanner* it appears to be given a new scope in the field of constitutional limitations on the police power. It will figure in the dissenting opinions in the *Blaisdell* case,⁶⁹ and the rent control cases,⁷⁰ and in the majority opinion in the cases invalidating regulation of wages and prices.

4. The federal commerce power is not as broad as the police power of the states. This is at least hinted at in the earlier *Adair*⁷¹ case. It is made explicit in Pitney's dissent in *Wilson v. New*, and is implicit in the prevailing opinion in the same case. The invalidation of federal legislation in *Hammer v. Dagenhart*,⁷² and in *Railroad Retirement Bd. v. Alton R.R.*⁷³ will hinge on this principle. The ultimate sustaining of federal legislation in the field of employment relations will depend on an answer to it. Hughes' insistence⁷⁴ that the power to regulate commerce must include the power to hold to their social responsibilities those who engage in it will not command a majority in the *Railroad Retirement Board* case. But the further refinement that a dispute disruptive of commerce must be resolved justly rather than unjustly will sustain federal power to establish collective bargaining in the area of commerce.⁷⁵

That a certain disequilibrium has been introduced by the recognition of these principles seems evident in retrospect. Both the conservative and the liberal positions have been restated in terms which, if not inconsistent, are at least incommensurable. The task facing the conservatives at this point is that of stating

⁶⁸ This seems to be the teaching both of Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and of Brandeis in *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

⁶⁹ *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 448 (1934) (per Sutherland).

⁷⁰ E.g., *Block v. Hirsh*, 256 U.S. 135, 158 (1921) (per McKenna).

⁷¹ *Adair v. United States*, 208 U.S. 161 (1908).

⁷² 247 U.S. 251 (1918).

⁷³ 295 U.S. 330 (1935).

⁷⁴ *Id.* at 374.

⁷⁵ *Texas & N.O.R.R. v. Brotherhood of Ry. and S.S. Clerks*, 281 U.S. 548 (1930); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). This standard, it should be noted, might not change the result in *Hammer v. Dagenhart*, *supra* note 72, since, as pointed out there, the objectionable practices were not connected with the regulated commerce itself. This objection was met by adding to the principle referred to in text a principle that forbids the use of interstate commerce to achieve socially undesirable results in the several states. *United States v. Darby*, 312 U.S. 100 (1941). This process, it will be noted, gradually assimilates the federal commerce power to the state police power.

their newly formulated principles in operationally significant terms consistent with the workmen's compensation cases, with *Bunting*, and with *Wilson v. New*. In this they will never quite succeed.

Meanwhile, redefining the scope of constitutionally protected individualism called not only for setting new limits on the police power — the process begun in *Adams v. Tanner* — but also for setting limits on the expanding public interest power. Here too, the need for operationally significant criteria was recognized,⁷⁶ but not quite met. The cases attempting to accomplish the task were first the *Wolff Packing Co.*⁷⁷ case, invalidating the ill-fated Kansas compulsory arbitration law; and, second, *Tyson & Bro. v. Banton*.⁷⁸ The categories of business affected with a public interest were reduced to three: (1) those that historically operated under royal prerogative or were traditionally regulated, (2) those that presently operate under some kind of public franchise, and (3) those that are in some way monopolistic. The first two were recognized by Field dissenting in *Munn v. Illinois*; the third was recognized by the *Munn* majority.

It was this third category that proved troublesome. The cases had moved "monopoly" far beyond its traditional meaning.⁷⁹ As it stood, it eluded definition. Stone, dissenting in the *Tyson* case, offered an interpretation of it as covering those businesses that could not be effectively regulated by the traditional forces of competition.⁸⁰ This was perhaps operationally significant, but evidently too broad to commend itself to the then majority. The result was that the conservatives were unable to set any effective limit to the kinds of business that were affected with a public in-

⁷⁶ Compare the two cases about to be discussed with the dissent in *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1914), where the problem of operational significance does not seem to be recognized.

⁷⁷ *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923).

⁷⁸ 273 U.S. 418 (1927).

⁷⁹ *Brass v. North Dakota*, 153 U.S. 391 (1894) held that the business of grain elevators was affected with a public interest on what seems to have been this ground, even though it was shown that there was 600 grain elevators along the particular railroad track involved, and that anyone wishing to build another could do so for \$500. *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1914) held the insurance business to be affected with a public interest for a complex of reasons, of which concert in rate making was only a minor one.

⁸⁰ 273 U.S. at 447. *Cf. A. B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233 (1925), holding that a civil remedy cannot constitutionally be given one charged an "unreasonable" price for sugar, since the conditions of the sugar market make it impossible to tell what is a reasonable price.

terest.⁸¹ Thus, a few years after *Tyson* in *Nebbia v. New York*,⁸² a majority held that the term "affected with a public interest" meant no more than that there were reasonable grounds for regulating the business involved—in other words, that any business could be regulated. Roberts, speaking for the Court in *Nebbia*, was able to make an overwhelming demonstration from the cases that no narrower limit could be supported. At least after *Brass v. North Dakota*,⁸³ and probably after *Munn* itself, *Nebbia* was inevitable.

The public interest power, however, had been subjected to another limitation which minimized its effectiveness as a support for social legislation. The *Wolff* case had held that the public interest was divisible, so that there might be a public interest in regulating some aspects of a business, and still not be a public interest in regulating wages. This ties in with the limitations on the commerce power assumed by the majority and articulated by the dissent in *Wilson v. New*. There would be at least some tendency to confine the public interest to the external affairs of a business, as distinguished from its internal ordering.⁸⁴

Meanwhile, it was held that the police power, even when it extended to fixing the other terms of a contract, did not extend to fixing prices—in the case of the employment contract, wages. *Adkins v. Children's Hospital*⁸⁵ held that wages could not be regulated, and *Ribnik v. McBride*⁸⁶ indicated that price regulation could not be supported by circumstances justifying a general exercise of the police power, but would have to stand or fall under the public interest power as limited in *Tyson*. The argument, expressed in *Adkins*, for protecting the price term more carefully than other terms of a contract seems to have been that it can compensate for the limitations on the other terms. This is fairly

81 When the opponents of regulation came to the point of adopting the criterion suggested by Stone in *Tyson*, it was too late. *Olson v. Nebraska ex rel. Western Ref. & Bond Ass'n*, 313 U.S. 236 (1941) (state need not justify price regulation by a showing that competition does not effectively regulate the business involved).

82 291 U.S. 502 (1934).

83 153 U.S. 391 (1894).

84 That the public interest power did not undergo the same change of content described above for the federal commerce power is probably due to the previous recognition of the police power as a power of the states. Assimilating the public interest power to the police power, as was done with the commerce power, was unnecessary. It seems likely, however, that the current abandonment of the distinction between the two powers of the state is responsive to a growing conviction that they are for the most part coextensive.

85 261 U.S. 525 (1923).

86 277 U.S. 350 (1928).

obvious when it comes to fixing standard weights for a loaf of bread,⁸⁷ but seems an oversimplification when it comes to wages. Except with respect to wages, of course, *Nebbia* made the question of the relation between the police power and price-fixing irrelevant.⁸⁸

The basic issue on which the question of wage-fixing was decided in *Adkins* was independent of the dubious social and economic doctrine Sutherland expounds in the opinion. The essence of Sutherland's argument seems to be the following: once it is decided that the state may protect the worker against himself, and that long hours are unhealthy for him, it naturally follows that the state may limit the number of hours of work he may contract to perform. This is in no way burdensome to the employer, because he need pay no more for the truncated work day than it is "worth" to him — no more than it will bring on the open market.⁸⁹ If the employer is incidentally vexed by not having the services of a favorite employee as long as he would like, he has no right to complain, because his rights are subordinate to the interest of the state in protecting the health of the employee.⁹⁰ But when the state begins regulating wages, it imposes a direct burden on the employer. Even if the state can and should see that the worker receives an amount set by public authority as enough to live on,⁹¹ there is no reason why the employer should

⁸⁷ *Schmidinger v. Chicago*, 226 U.S. 578 (1913).

⁸⁸ Since the public interest power had always been recognized as extending to price-fixing, the recognition in *Nebbia* of an across-the-board public interest power carried with it an across-the-board price-fixing power. On this basis, *Ribnik* was overruled on its own facts in *Olsen v. Nebraska*, *supra* note 81.

⁸⁹ Whether the *Adkins* court would have decided that some standard of worth extraneous to the contract could be brought in to determine worth is something we will never know. Compare *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233 (1925) with *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922). *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) considered a statute that purportedly regulated wages on the basis of worth, but the majority of the court did not read the statute as embodying a worth test.

⁹⁰ It will be noted that the main center of controversy in *Bunting* was whether the provision for extra pay for overtime constituted a wage regulation—the argument against the statute being, of course, that a given number of hours of labor was not rendered less deleterious to the health by being paid for at an increased rate. The answer of the court that the overtime pay provisions are intended as a penalty seems far-fetched, but is perhaps not an inaccurate statement if one thinks of the provision for extra pay as calculated to discourage overtime as an institution, rather than to penalize it in the individual instance. See *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577-8 (1942). The distinction between commutative and social justice, as drawn in note 65, *supra*, seems relevant here.

⁹¹ To be sure, Sutherland would have it that the determination of how much the worker needs to live on is a highly personal matter best discovered from the judgment of the worker himself as embodied in the wage contract to which he has

be obligated to furnish that amount unless the services performed by the employee are "worth" that much.⁹²

This argument seems almost identical with that advanced against workmen's compensation legislation — minimum wage laws are another example of Robin Hood legislation. Since it still seems to be the law that the state cannot constitutionally make one person contribute to another without some reason other than the greater affluence of the contributor, the argument of the *Adkins* opinion, like that against workmen's compensation, can only be answered by a moral judgment as to the social responsibilities arising out of the employment relation. That a person who devotes his productive activity to a business is entitled to be supported, together with his dependents, by that business is a moral principle and the prevailing opinion in *West Coast Hotel Co. v. Parrish*,⁹³ in which *Adkins* was overruled, is predicated on it. *Adkins* says that to make the employer pay wages based on need is to put on him a burden rightly that of the state. *Parrish* says that to place underpaid workers on the relief rolls is to make the community provide "a subsidy for unconscionable employers."⁹⁴

A similar moral judgment was the basis for the establishment of governmental power to foster the collective bargaining rela-

agreed. This argument, however, is not heavily relied on by Sutherland. It seems to be premised on the theory that the state cannot protect the individual against himself, which, as we have seen, was rejected in *Holden v. Hardy*. In the particular case, Sutherland's conviction of the impracticality of setting a minimum wage was reinforced by the action of the administrator, who found that the wage necessary to preserve health, morals and decent living differed from job to job.

⁹² Holmes in his dissent in *Adkins*, 261 U.S. at 567, points out with a good deal of logic that the employer will not retain services unless they are "worth" to him what he is required to pay for them. But the moral issue otherwise present in the case seems to lurk also in the point thus stated. Whether and to what extent "worth" is a function of market is involved in the analyses of both Holmes and Sutherland. Holmes seems to mean that the employer would rather pay the required price for the services than do without them. Sutherland would have the answer that his willingness to pay the minimum wage for them is responsive not to their "worth," but to the fact that the minimum wage law prevents his getting similar services cheaper from another. Thus, the law requires the employer to pay for all such services more than they are "worth." What this exchange would indicate appears to be the inability of Sutherland to see a standard of "worth" independently of a freely operating economy, and the inability of Holmes to see a standard of "worth" independently of a freely operating legal system. These are the same ideological presuppositions that the respective justices have displayed throughout the cases under discussion.

⁹³ 300 U.S. 379 (1937).

⁹⁴ *Id.* at 399.

tion in the *Railway Clerks*⁹⁵ case. An employer who had dismissed certain employees in the course of an attempt to establish a company union was directed under the Railway Labor Act to reinstate them. The Court held that the power of Congress to regulate commerce included a power to adjust, equitably, disputes that threatened to disrupt it, and that a vindication of the right of collective bargaining by freely chosen representatives was an equitable adjustment of a dispute, or potential dispute, on this subject. *Adair* and *Coppage* were distinguished on the ground that the statutes invalidated in those cases went directly to the hiring and firing of workers — matters enjoying special protection, presumably, under the principles already announced — whereas those activities were reached here only by way of affording relief from the non-protected practice of establishing a company union.

After this case, the *Railroad Retirement Board*⁹⁶ case comes as something of a surprise, with its holding that the commerce power is not adequate to provide a pension plan for railroad workers. It is possible that the employment of superannuated personnel did not threaten to disrupt commerce as strikes did, and on that basis a distinction might be made. But the court added that even if superannuation did seriously impair the efficiency of the service, the federal power would be exhausted by a requirement that the superannuated worker cease to work, without a provision for pensioning him off. This seems unjustified in view of the unanimous decision in the *Railway Clerks* case that the power to eliminate an obstacle to commerce is the power to eliminate it justly. At any rate, in the subsequent Wagner Act cases⁹⁷ the

⁹⁵ *Texas & N.O. R.R. v. Brotherhood of Ry. and S.S. Clerks*, 281 U.S. 548 (1930).

⁹⁶ *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1935).

⁹⁷ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937); *Washington, Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142 (1937); *Associated Press v. NLRB*, 301 U.S. 103 (1937). The position of the conservative justices as to the principle set forth in text is somewhat difficult to fathom. Of the Wagner Act cases, they dissented in all but the one that involved a common carrier in interstate commerce. But in their dissenting opinion they relied on due process objections under *Adair* and *Coppage* as well as on strict commerce clause objections. They distinguished the *Railway Clerks* case, in which they concurred, by quoting the distinction of *Adair* and *Coppage* offered there. Assuming that these justices maintained a consistent position in all these cases, it would seem to be that the free choice of whom to employ, as given constitutional protection under *Adair* and *Coppage* can be interfered with only as a sanction to preserve the right of collective bargaining where the movement of commerce is at stake, but not for any other reason.

court seems to have returned to this principle, but not to have embraced Hughes' view, enunciated in his dissent in the *Retirement Board* case, that the power to regulate commerce included a power to have it conducted with due regard for social responsibilities, whether or not a disruption is threatened.⁹⁸

III

Regardless of what may be said about the opinions just discussed on the conservative side, a reading of them should indicate that they are no more examples of "mechanical jurisprudence" than are any of the more recent emanations from the court. They are opinions of earnest men coming to grips with live issues. They are marked by an ardent conviction that we should not fail to respect, even if we might wish it bestowed on doctrines more worthy of it. Nor can the judges be accused of paying too little attention to the burgeoning sciences of economics and sociology. Whenever those sciences showed conditions that could not be discerned unaided and that were considered relevant to the validity of the legislation under review, they were given careful heed, and often relied on. The liberal wing of the court never did more. Thus, the data advanced by Butler in support of the legislation struck down in *Near v. Minnesota*,⁹⁹ made a showing very similar to Brandeis' in *Adams v. Tanner*, if less elaborate. In both cases, the majority ignored the data thus advanced because they saw a principle that transcended any considerations of expediency or social policy. Indeed, it appears that nowadays we have again reached a position in which most due process cases can be decided without the benefit of sociological data. In economic regulation cases, no such data are necessary to sustain the legislation;¹⁰⁰ in free speech and similar cases no such data are availing to sustain it. In other words, far from refusing to listen to sociological data, the conservative judges called forth such data by embracing a scheme of juris-

⁹⁸ A further move in the direction of this last view seems to have been taken in *United States v. Darby*, 312 U.S. 100 (1941). See note 75 *supra*. It is interesting that McReynolds, the only one of the conservatives left on the court, did not dissent in *Darby*.

⁹⁹ 283 U.S. 697 (1931).

¹⁰⁰ *Olsen v. Nebraska ex rel. Western Ref. & Bond Ass'n*, 313 U.S. 236 (1941).

prudence to which sociological considerations are at least sometimes relevant.¹⁰¹

For the conservative judges in the cases under consideration, as for the liberal judges in the free speech cases, the problem is one of a relation between an interest committed to the legislature for protection and one committed to the judiciary for protection. For judicial resolution of such a problem it seems necessary that two questions be asked and answered if the judicial protection is to be adequate:

1. Is the legislative interest really present here, or is the legislation in fact calculated to vindicate the antithesis of the judicially protected interest? This question was answered adversely to the legislation in *Lochner*, in *Coppage*, and perhaps in *Adams v. Tanner* as well, on the theory that the legislation involved was not in fact motivated by the public health, safety, morals or welfare, but by a purpose to adjust between the propertied and the propertyless in a manner opposed to the judicially protected property interest. A similar adverse answer is given in free speech cases where the requisite danger to public safety is not present — the interest to be vindicated by the legislation turns out to be an interest in silencing offensive voices, rather than an interest in protecting the public safety.¹⁰² To answer such a question, the impact of the interdicted conduct must be given careful consideration on the facts, whereupon the nature of the interest being vindicated can be considered.

2. If the legislative interest is present, is the vindication here chosen so destructive of the judicially protected interest as to be invalid? This question was answered adversely to the legislation in *Adkins*, perhaps in *Adams v. Tanner*, and in *Near v. Minne-*

¹⁰¹ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (per Sutherland), is the prime example of the use of scientific data by the conservative justices; cases like *Advance-Rumley Thresher Co. v. Jackson*, 287 U.S. 283 (1932) (per Butler) employ the same kind of data, but seem to have gathered them not from any source that would be characterized as scientific, but from more or less unsupported statements in the opinion of the state court. At any rate, there seems to be no support for a view that the liberal justices made a practice of relying on scientific data, whereas the conservatives relied on "common sense" or other non-scientific determinations. This may have been true in particular cases, such as *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), but was not true in general. *New State*, it should be noted, came between *Tyson* and *Nebbia*, so that the field was in a state of flux. The conservative justices must have been in some doubt as to the point at which their ideological positions were to be drawn up.

¹⁰² The distinction is perhaps best brought out in Brandeis' dissent in *Gilbert v. Minnesota*, 254 U.S. 325 (1920).

sota, where the doctrine that constitutional rights have "essences" was articulated. Legislation may be invalidated under this test either if it invades the "essence" of the judicially protected interest, as in the cases just mentioned, or if it is predicated on the view that the legislative interest can best be served by the abrogation of the judicially protected interest. Thus, the conservative judges held that the police power did not justify doing away with important attributes of property as an institution on the ground that public health, safety, morals or welfare would be better served without them;¹⁰³ thus it is held today that the state cannot prohibit the expression of certain opinions on the ground that they are so antipathetic to public sentiment that the very expression of them leads to breaches of the peace.¹⁰⁴

It appears, then, that the conservative judges cannot properly be accused of unjudicial behavior in their manner of going about the protection of the interests they decided to protect. What must be objected to, if anything, are the interests thus protected. Such objection is possible either on ideological grounds, or on the ground that the constitutional provision involved does not call for an ideological decision.

Whether the provisions of the fourteenth amendment called for an ideological evaluation of "liberty," "property," and "due process of law" was carefully considered both in the *Slaughter-House Cases* and in *Munn v. Illinois*. In the latter case, an affirmative answer was given by the full Court. The liberty of the Negro was to be protected by placing the whole structure of freedom from ideologically improper governmental encroachment under federal protection. Liberty and property were to include the fullest possible enjoyment of faculties and things owned; due process was to include only the ideologically justifiable activities of government. Whether this structure was constitutionally legitimate was regarded by all concerned as no longer open to question.¹⁰⁵

¹⁰³ The most earnest statement of this view appears in Sutherland's dissent in *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). *Coppage* may also be an example.

¹⁰⁴ *Terminiello v. Chicago*, 337 U.S. 1 (1949).

¹⁰⁵ The liberal justices invoked the same structure in the free speech cases. Without admitting it to have been legitimate in its inception, they held that it was so firmly embodied in the cases that it could be used in evaluating restraints on speech. *Gitlow v. New York*, 268 U.S. 652 (1925) (per Holmes, dissenting); *Whitney v. California*, 274 U.S. 357 (1927) (per Brandeis, concurring).

Admitting, therefore, that the intent of the framers of the fourteenth amendment was to give ideological content to its provisions, are succeeding judges at liberty to include in that content some ideological commitment other than that of the framers themselves? It would seem that the question as thus stated must be given an affirmative answer. The framers of the constitutional provisions involved seem to have envisaged liberty not as an administrative adjustment, but as a heritage. They had open to them the choice of painting with broad strokes or with narrow strokes, and chose the broad. How they would have filled in the outlines does not seem too relevant in view of their deliberate choice of leaving it to their successors to fill them in. The interaction between static and dynamic elements in law is not peculiar to the constitutional field; nor is the interaction between the conscience of the judge and the emanations of the consciences of his authorities. The ability to operate with integrity and vision in these fields of interaction makes great judges, and the formula for greatness cannot be put down in a paragraph. Suffice it to say that none of the justices in the cases under discussion seems to have transgressed the bounds of legitimate judicial behavior in this respect.

Holmes, although he formulates his objection to his colleagues' decisions in terms of an unwarrantable importation of an ideological commitment into the Constitution, seems to be making his evaluation in terms of an ideological commitment of his own. His conviction, embodied in his long series of lonely dissents, seems to have been that it is unavailing, and probably unwise, to attempt any ultimate check on the eventuation of something strongly enough desired by public opinion. This left him convinced that only activities directed toward the influencing of public opinion are entitled to judicial protection.¹⁰⁶ Any other constitutional protections he was willing to afford came strictly from legal considerations — like those involved in *Pennsylvania Coal Co. v. Mahon*—¹⁰⁷ without ideological content.

In those views, Holmes was able to influence a number of his successors, but none of his colleagues except possibly Brandeis.¹⁰⁸

¹⁰⁶ See also Holmes' dissenting opinions in *Abrams v. United States*, 250 U.S. 616, 624 (1920); *Gitlow v. New York*, *supra* note 105.

¹⁰⁷ 260 U.S. 393 (1922).

¹⁰⁸ See his concurrence in *Whitney v. California*, *supra* note 105. It will be noted that Brandeis' opinions in the economic cases are entirely different from Holmes', although one usually joins in the opinion of the other. It is perhaps significant that

The other judges of the period seem to have seen liberty as embodying the protection to be accorded the individual on ideological grounds against the action of government, whether or not supported by public opinion. This view seems both more in keeping with our constitutional tradition,¹⁰⁹ and more consistent with the institution of judicial review of legislation.¹¹⁰ Certainly, in any area where the ideological considerations are seen as independent of public opinion, Holmes' view of the Constitution will not do.

Ultimately, the objection to the position of the conservative justices must be made on ideological grounds. Holmes is right in saying that the position rests on an ideology, but wrong in saying that it can be rejected without passing judgment on the ideology on which it rests. What that ideology is should be apparent from the foregoing discussion. Basically, it is a disclaimer of the right of the Court to make a moral judgment. Thus, when Sutherland says in *Adkins* that if the state can set minimum wages it can also set maximum wages, he seems to be insisting either that no moral judgment on the quantum of wages is possible, or that none is legally cognizable. To answer him, it must be held that the payment of high wages is, generally speaking, better morally than the payment of low wages,¹¹¹ and that this fact has legal consequences. As has been shown, the case overruling *Adkins* held exactly that.

The doctrinaire individualism which actuated the Court in the nineteenth century and influenced the conservative judges of the twentieth, seems to stem from a philosophical commitment to the view that no institutional supersession of the individual's

Brandeis concurred in Pitney's opinion in the *Arizona Employers Liability Cases*, although Holmes did not. See p. 14 *supra*. That Brandeis was more concerned with ideological considerations than was Holmes is borne out also in cases where they disagreed with each other; the familiar *Pennsylvania Coal* case, and *Meyers v. Nebraska*, 262 U.S. 390 (1923).

¹⁰⁹ See *THE FEDERALIST*, Nos. 51, 78 (Hamilton).

¹¹⁰ For an elucidation of this writer's views on this subject in another context, see *Religious Education and the Historical Method of Constitutional Interpretation*, 9 *RUTGERS L. REV.* 682, 694-95 (1955).

¹¹¹ This statement will, of course, be subject to important qualifications, as when some ceiling on wages is necessary to control inflation. Similarly, even though a general principle of morality calls for a business to pay a wage sufficient to maintain those who devote their productive activity to the business, it may be appropriate for a person who is under some physical disability impairing his productive capacity to be only partially supported by the business to which he devotes himself, the difference being made up by some program of social insurance against disability.

moral judgment of his own acts is permissible. Under this view, the jural concept of liberty, with its ancillary concept of property, is absolute; and the law's function is limited to fixing the boundary between the area in which A is free to do good or evil as he may choose, and the area in which B is free to do the same. In the end, the view of the nature of man and of society on which these doctrines were based proved itself repugnant to reason and experience alike. The sociological data that found its way both into legal argument and into the general literature of the period certainly contributed heavily to the disillusionment with the individualist ethic, and thus to the intellectual climate in which older traditions of social responsibility reasserted themselves. But ultimately these traditions rest not on sociological data but on the brotherhood of man — and the brotherhood of man is not a sociological doctrine.

Liberty, as our institutions know it,¹¹² does not demand the individualistic ethic. It postulates not that there is no legally cognizable distinction between good and evil, but that there are some goods that will serve their purposes only if freely given. It has long been our experience as a people that many goods, even

112 "Liberty" or "freedom" appears in our legal institutions as a limitation on the power of government in favor of a choice made by the individual. The forms this limitation has taken in political and ethical theory would seem to be the following:

- (1) Government cannot evaluate objectively the validity of a moral choice made by the individual (freedom of conscience₁).
- (2) Government should set a high value on allowing the individual to give effect to his moral choice, even if that choice is objectively wrong (freedom of conscience₂).
- (3) Government should not prevent the individual from doing wrong (freedom to do wrong).
- (4) Government should not prevent the individual from doing something unless it is wrong (freedom to do right).

Freedom of conscience₁ would seem to be the foundation of the individualist ethic, as discussed in text. It postulates that only the individual can say what is best for himself. From this, it seems to follow that the highest good of the individual may be contrary to the good of his neighbor or of society. *Cf. Reynolds v. United States*, 98 U.S. 145 (1878) (religious convictions of individual held no excuse for violation of law enacted for good of society, without any attempt made by court to consider whether those convictions are objectively true or false). This view regards society as in essence competitive, and in effect, denies the brotherhood of man.

Freedom of conscience₂ is basically what is suggested in text as the proper scope of jural liberty. If social ties are to be built on love rather than fear, the basic weapon of society against deviant behavior must be persuasion rather than suppression. See *West Virginia Board of Ed. v. Barnette*, 319 U.S. 624 (1943). This desideratum must, however, be weighed in the balance with other goals of society. The result of such a weighing in the area under discussion seems clearly to be in favor of governmental intervention.

some of those most necessary to society, are such. But a living wage is not one of them. That a commitment to liberty did not, in a society whose roots are Christian, preclude the vindication of the two simple principles on which, as we have seen, the cases sustaining the validity of our social legislation were rested should be no surprise. *Holden v. Hardy* established in the employment area the ancient principle that a man may not destroy himself even if he wishes to. The workmen's compensation cases added to this that the economic unit to which he gives his life must provide him with the means to live. These are minimal requirements of our membership in one another and in society. The state may, indeed should, give them effect with the means at its command.

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Freedom to do wrong is a dubious political construct on the theological doctrine of freedom of the will. Government, it is argued, should not attach sanctions to the doing of evil, because it thereby diminishes the merit of one who chooses to do good. This is theologically unsound. The same theology that teaches that God has left the will free teaches that He has provided it with every possible extrinsic assistance to choose good, and that human society is intended to constitute one such assistance. See Leo XIII encyclical *Libertas Praestantissimum*, June 30, 1888.

Freedom to do right is responsive to what seems a proper evaluation of the worth of the individual. Since people partake of the same nature, there are some ethical principles that are binding on all. At the same time, since people are greatly diversified, there is no one course of action that is better for everyone than all others. Thus, the state should content itself with preventing evil, without imposing one good to the exclusion of alternative goods. This principle may have been violated to some extent by the mercantilism of the eighteenth century, and to the extent vindicated by the revolutions of the nineteenth. It is no doubt a part of our constitutionally protected liberties, *but cf.* *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949) (union shop contract cannot be given constitutional protection unless *Adkins* and *Lochner* are to be revived), but it has not been mentioned in text because it does not seem germane to the area under discussion. It does not protect either conduct unjust in itself, or conduct productive of socially undesirable consequences.

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